71-803

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

ARTHUR ERNEST LANE,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Arthur Ernest Lane, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Ninth Circuit, filed November 11, 1971, and the decision and order of the Board of Immigration Appeals, dated July 12, 1971.

The decision of the Board of Immigration Appeals is not reported, but a copy of said opinion is appended hereto as Appendix "A". The decision of the Court of Appeals, Ninth Circuit, is not reported, but is appended hereto as Appendix "B".

Jurisdiction.

The judgment of the United States Court of Appeals, Ninth Circuit, was made and entered November 11, 1971.

Jurisdiction of this Court is invoked under Title 28, U.S.C. 1254(1).

Questions Presented.

Has there been a "conviction," under California law, within the contemplation of Title 8 U.S.C. 1251(a)(11) (Section 241(a)(11) of the Immigration and Nationality Act) when a plea of guilty has been set aside, a plea of not guilty entered, and the complaint dismissed by the California court, pursuant to state statute, to wit, Section 1203.4 of the California Penal Code?

Can the Federal Government, while looking to the convictions in a state court under state statutes to support a deportation order, refuse to recognize the setting aside of the plea of guilty to the same conviction, the entry of a plea of not guilty, and dismissal of the complaint, pursuant to state statute? Can an order of deportation be sustained, under such circumstances, on the charge that the petitioner has been "convicted"?

Can the Federal Government, which concedes that a deportation charge based upon a conviction under state statutes will *not* be supported when, under said Section 1203.4 of the California Penal Code, such conviction has been set aside, a plea of not guilty entered and the complaint dismissed, make an exception to the legal effect of such state statute when it is a marihuana conviction which is involved, although the state statute itself makes no exceptions or differences as to such legal effect?

Statutes Involved.

Section 241, Immigration and Nationality Act:

"Section 241. Deportable aliens — General Classes.

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

"(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;" (Title 8 U.S.C. 1251 (a)(11); 66 Stat. 204).

Section 1203.4 of the Penal Code of the State of California:

"Section 1203.4 (Right of Discharged Probationer to withdrawal of plea of guilty or vacation of verdict of conviction: Release from disabilities: Making of application: Pleading of conviction in

prosecution for subsequent offense: Effect of dismissal of accusation or information pursuant to this Section.)

"Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

"Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his custody or control any firearm capable of being concealed upon the per-

son or prevent his conviction under Section 12021; (Added by Stats. 1935, ch. 604, Sec. 5, p. 1709; amended Stats. 1941, ch. 1112, Sec. 1, p. 2815; amended by Stats. 1951, ch. 183, Sec. 1, p. 434; amended Stats. 1961, ch. 1735, Sec. 1)."

Title 28 U.S.C. 1738:

"Section 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

"The Acts of the legislature of any State, Territory, or possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereof.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." (June 25, 1948, c. 646, 62 Stat. 947.)

Statement of the Case.

Petitioner is a native and citizen of Great Britain, who has been a lawful, permanent resident of the United States since August 19, 1963.

On July 15, 1968, petitioner was convicted in the Superior Court, State of California, for unlawful possession of marihuana, in violation of Section 11530, California Health and Safety Code. The said offense was adjudicated a misdemeanor. Petitioner was placed on probation for three years and fined $240.00.

On August 27, 1969, the Court terminated probation, and entered an order setting aside and vacating the conviction, a plea of not guilty was entered, and the accusation filed against petitioner was dismissed; and "the said defendant is hereby released from all penalties and disabilities resulting from the offense of which the said defendant was convicted."

A copy of the Order Dismissing Accusation Against Probationer is attached hereto, Appendix "C".

The Board of Immigration Appeals, in its decision, agreed with the decision of the Special Inquiry Officer who presided at the administrative deportation hearing, that the conviction of petitioner rendered him deportable despite the expungement under Section 1203.4 of the California Penal Code. Upon a petition for judicial review in the Court of Appeals, the court sustained the respondent's motion for summary affirmance of the order of deportation.

REASONS FOR GRANTING THE WRIT.

The writ should be granted because:

(1) The issues involved raise vital questions relating to the enforcement of the immigration laws of the United States, and thereby the fate of aliens who find themselves in the same straits as petitioner.

(2) The question of whether the Federal Government must give due recognition to the act of a State court, in respect to the setting aside of a State conviction upon which the Federal Government relies, is at the heart of this case and our system of Federal-State relations. The Supreme Court should determine whether the Federal Government must give meaning and effect to a State statute and judicial acts thereunder, and whether a "conviction" under State statute and procedure for a State offense is a Federal question or a State question. The broad implications of this issue cast a long shadow upon our Federal-State system.

(3) The authorities are in conflict and apparently inconsistent in the interpretation and application of the law.

It has been, and still is, the firmly established rule of the respondent and the Board of Immigration Appeals—since at least 1941—that where a California Court has expunged a record of an alien's conviction under Section 1203.4 of the California Penal Code, the conviction *cannot* serve as a basis for a deportation order, even if such conviction was for murder. Matter of G-I Immigration and Nationality Decisions 96 (1941) approved by the Attorney General January 14, 1942. Matter of L-R., VII Immigration and Nationality Decisions 318, approved by the Attorney General February 18, 1957. In Matter of O-T, IV Immigration and

Nationality Decisions 265, the Immigration and Naturalization Service stated:

> "The Service and the Board of Immigration Appeals have held in numerous cases that the proceedings under Section 1203.4 (of the California Penal Code) expunge the record of conviction and that thereafter it may not serve as the basis for an order of deportation." (1951)

Respondent still adheres to the view expressed above, but now takes the position that it does not relate to narcotic offenses, and in narcotic cases, the respondent refuses to give the same effect to the same Section 1203.4 of the California Penal Code, although said section makes no exceptions.

The Court of Appeals, Ninth Circuit, in the case of *Kelly v. Immigration and Naturalization Service*, 349 F.2d 473, which was the first time the issue was raised in court, sustained the government's position in a 2-1 decision. Thereafter, subsequent cases which came before the same court on the issue were decided in accordance with the majority opinion in the *Kelly* case.

It is submitted that the decision of the court below in this case, and the *Kelly* case, are in error, and are in conflict with decision of this court in *Pino v. Landon*, 394 U.S. 901, where it was held that where a sentence was revoked under Massachusetts procedure, the conviction did not have such finality as to support an order of deportation.

In *Sankow v. Immigration and Naturalization Service*, 314 F.2d 34, in discussing the government's contention that if a judgment of conviction is vacated for the purpose of avoiding deportation, a subsequent rec-

ommendation against deportation is ineffective, the court stated:

> "This argument misses its mark, for no contention is made that the state court either exceeded its jurisdiction or abused its discretion in vacating the plea of non vult together with the judgment of conviction, and subsequently dismissing the indictment. Thus, the action of the state court is concededly valid. That being so, the original judgment is as much a nullity as if the grand jury had never returned an indictment."

The same court (Third Circuit), in stating a well settled rule, held, "In deportation cases where a state crime is involved, we must look to the law and procedure of the state to interpret what happened in the state court." *Holzapfel v. Wyrsch*, 259 F.2d 890.

The refusal of the respondent to recognize state law and proceedings prompted this comment in the dissenting opinion in the *Kelly* case cited above:

> "Now, our court has said that while it will respect California law, insofar as California law provided for the crime and the 'conviction,' it may not accord to California the same respect in the application of its statute or of its decisions in the interpretation of the effect of a subsequent procedure taken under a California statute of the same dignity as that which created the crime."

The court below ignores the state law, which declares the expungement wipes out the criminal proceedings as if no prosecution had ever been brought against him. *People v. Taylor*, 3 Cal. Rptr. 186 (1960), 178 Cal. App. 2d 472; *Truchon v. Toomey*, 116 Cal. App. 2d

736; "*The Federal Penal System*", 10 F.R.D. 539, by Judge Yankwich, U.S. District Court, Los Angeles, California, states that an expungement enables a convicted person to "claim truthfully that he has never been convicted of a felony."

Conclusion.

This Court should resolve the question of whether the Federal Government can ignore a judicial act under State law by a State court and whether full faith and credit must be given the State law and judicial acts of a State court under such law.

This Court should resolve the vital question of whether the Federal Government can make its own determination of what constitutes a "conviction" under State law, particularly as it relates to Section 1203.4 of the California Penal Code, or whether the Federal Government can ignore the acts of California courts applying State law?

The Court should resolve the question of whether the respondent is correct in holding to an inconsistent position by agreeing that an expungement of a conviction under Section 1203.4 of the California Penal Code is a bar to deportation, but if the conviction is for a narcotic offense, the same expungement statute is not a bar to deportation.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: January 7, 1972, at Los Angeles, California.

SIDNEY BROFFMAN,
Attorney for Petitioner.

APPENDIX A.

United States Department of Justice, Board of Immigration Appeals.

File: A13 599 533—Los Angeles.

In re: Arthur Ernest Lane

In Deportation Proceedings

Appeal.

July 12, 1971.

On Behalf of Respondent:—Sidney M. Kaplan, Esquire, 756 S. Broadway, Suite 818 Los Angeles, California 90014 (Brief filed).

CHARGES:

Order: Section 241(a)(11), I&N Act [8 U.S.C. 1251(a)(11)]—Convicted of illicit possession of marijuana

Lodged: None

APPLICATION: None

In a decision dated May 14, 1970, the Special Inquiry Officer found the respondent to be deportable on the charge contained in the Order to Show Cause, and directed his deportation. From this decision the respondent through counsel has appealed to this Board. The appeal will be dismissed.

The respondent is a divorced male alien, a native of England and a citizen of Great Britain, who was admitted to the United States for permanent residence at Detroit, Michigan, on August 19, 1963. The record shows that on July 15, 1968, he was convicted in the Superior Court, State of California, for unlawful possession of marijuana, in violation of Section 11530 Cali-

fornia Health and Safety Code. It was on the basis of this conviction that the Special Inquiry Officer found the charge sustained.

It is the contention of the respondent that the Special Inquiry Officer was in error. It is claimed that there was no conviction and that proceedings in the state criminal action had been dismissed pursuant to section 1203.4 of the Penal Code of the State of California. It is further contended by respondent that the Special Inquiry Officer was in error because the action and the Accusation filed therein was dismissed by the Superior Court by order dated August 27, 1969.

Our review of the record shows that on July 15, 1968, the respondent appeared before the court and pled guilty to violation of section 11530 of the Health and Safety Code of California. Conviction for such violation and imposition of sentence was suspended for a period of three years. An appeal was taken and the Court of Appeals for the Fourth Appellate District of California affirmed the conviction by the Superior Court. Thereafter the Superior Court modified its order and terminated the respondent's probation. The Superior Court then entered an order directing that the conviction be vacated, set aside and that the action be dismissed. This amounted to an expungement of the crime.

The Special Inquiry Officer has fully set forth the reasons for his decision and has cited authority for his action. We agree with his construction of the governing legal principles.

The Special Inquiry Officer also denied a motion to terminate submitted by the respondent during the course of the proceedings, which motion was based upon the

allegation that the respondent was not aware at the time of his plea of guilty that he would become subject to deportation. The Special Inquiry Officer's holding in this regard was proper.

Contention by the respondent that the deportation proceedings were not fair have been completely answered in the Special Inquiry Officer's decision.

We have given careful consideration to this record, together with the brief submitted by counsel for the respondent on appeal. We find that deportability has been established by evidence that is clear, convincing and unequivocal. Accordingly, the following order will be entered.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

APPENDIX B.

Order:

United States Court of Appeals for the Ninth Circuit.

Arthur Ernest Lane, Petitioner, v. Immigration and Naturalization Service, Respondent. No. 71-2412.

Filed: Nov. 11, 1971.

Before: KOELSCH and DUNIWAY, Circuit Judges

Upon motion of the Immigration and Naturalization Service, and there being no opposition filed to the motion, and it appearing that the question presented in the petition for review is controlled by prior decisions of this court, see *Cruz-Martinez v. I&NS*, 9 Cir., 1968, 404 F.2d 1198 and cases there cited, the motion for summary affirmance is granted, and the order sought to be reviewed is affirmed.

M. Oliver Koelsch
Ben C. Duniway
United States Circuit Judges

A True Copy.
Attest
Wm. B. Luck
Mot.cal.Nov. 5. 1971

APPENDIX C.

Order Dismissing Accusation Against Probationer (Sec. 1203.4 P.C.)

In the Superior Court of the State of California in and for the County of San Diego.

The People of the State of California, Plaintiff vs. Arthur Ernest Lane, Defendant. No. CR 12500.

This matter coming on this date for hearing and it appearing from the report of the Probation Officer filed herewith, that the said defendant was granted probation by this Court on August 6, 1968 for the term of three (3) years after conviction of the crime of Possession of Marijuana (11530 H&S), lesser included offense of Possession of Marijuana For Sale (11531 H&S), Adjudicated a Misdemeanor.

And it further appearing that said period of probation has been terminated and that the said defendant has fulfilled the conditions of the Order of Probation made in the above-entitled cause;

Now, Therefore, It Is Ordered that the conviction entered herein be, and the same hereby is, vacated and set aside and a plea of not guilty entered; and

It Is Further Ordered, Adjudged and Decreed that the above-entitled action, and the Accusation filed therein be, and the same is hereby, dismissed; and the said defendant is hereby released from all penalties and disabilities resulting from the offense of which the said defendant was convicted.

Dated: Aug. 27, 1969.

Attest: A true copy.
R. B. JAMES, County Clerk
by [Illegible]

ROBERT O. STANIFORTH
Judge of the Superior Court